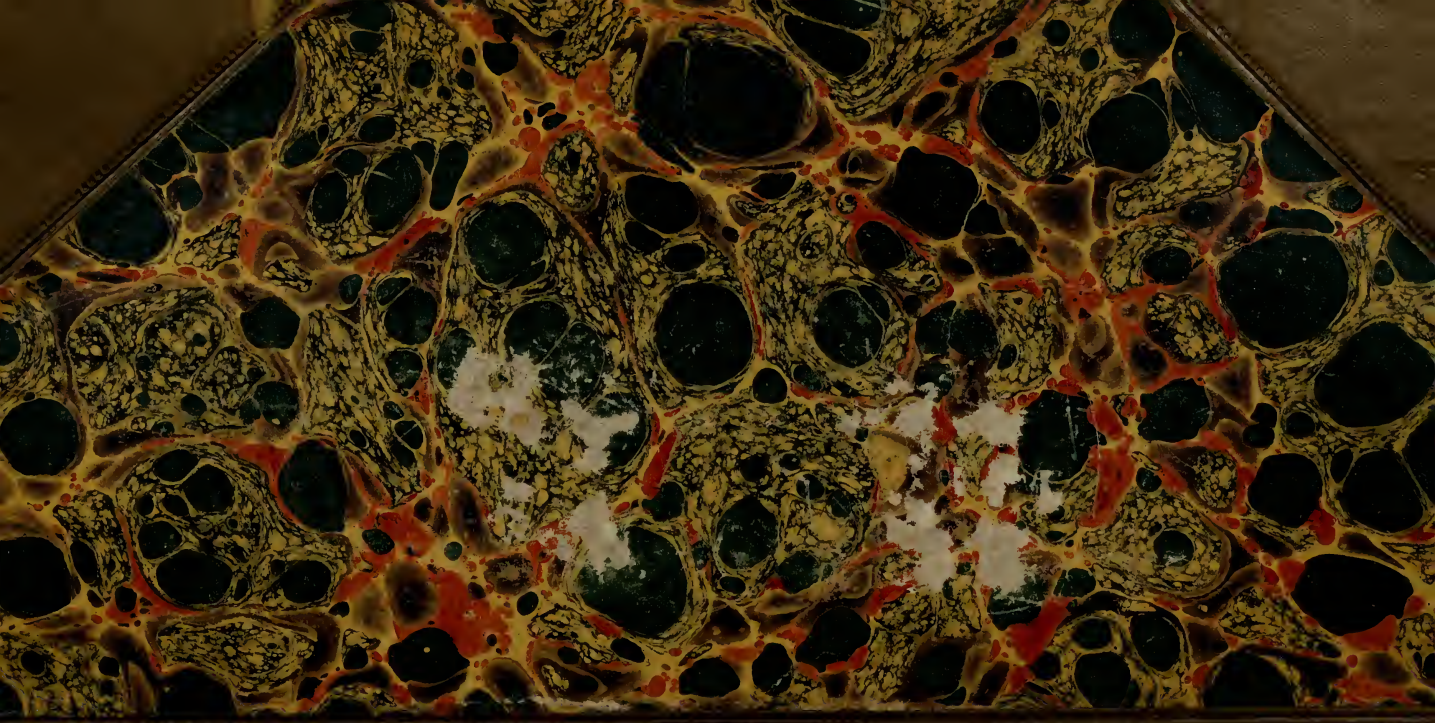

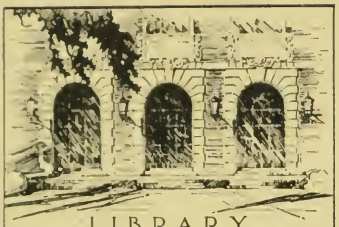

THE STATEMENTS

IN THE

CLAIM OF RIGHT:

ARE THEY TRUE?

By VERITAS

EIGHTH THOUSAND.

GLASGOW:
JAMES MACLEHOSE, 61 ST. VINCENT STREET.
EDMONSTON AND DOUGLAS, EDINBURGH. HAMILTON, ADAMS AND CO., LONDON.
1875.

THE CLAIM OF RIGHT.

WHEN a Free Churchman is asked the reason of his separation from the Church of Scotland, he points for answer to the "Claim of Right," and he asks in return, whether any conscientious man could have remained in the Church under the state of matters disclosed in that document. I have always had a certain sympathy with that answer. The man believes in the Claim of Right. He believes that the Court of Session did all the things detailed in it. Why should he not believe in it? He never himself, of course, examined into the facts on which its conclusions are founded. It would be unreasonable to suppose that he had done so. It would take an astute lawyer weeks of labour to examine in detail all the facts and circumstances with which it deals; and few ministers, and fewer laymen, could be expected to enter on such an investigation. But that is no reason why the Free Churchman, who read the Claim of Right after it was laid on the table of the General Assembly in 1842, should have hesitated to assume its accuracy. It was prepared by a Non-intrusionist—one of his own party—a man in whom he had implicit confidence—a lawyer of long standing—one who had for many years made church matters and church law his

special study. I confess that if I had myself been one of that party, and had possessed no other source of information, the chances are, that whatever doubts I may have previously had, would have been determined by a perusal of the Claim of Right, and that I would probably have left the Church with the rest. Just look at it. Anything more unjust, more overbearing, more tyrannical than the conduct of the Scotch judges, if we accept the statements in this remarkable document, it would be impossible to conceive. Justice had been denied, Acts of Parliament trampled upon, the rights of the Church overborne, and every principle of law and equity set at defiance.

Is it surprising that after reading such a statement, so prepared, and solemnly adopted by the majority in the General Assembly, so many Scotchmen—ministers and laymen—should have left a Church which they believed had been subjected to such treatment, and for which, when as a last resource complaint was made to the State, redress was refused? I do not think it surprising.

But what if the things alleged in the Claim of Right to have happened did not happen? What if the statements are not true?

This, to an intelligent and conscientious Free Churchman, must be a very startling question. But he must meet it; and my present object is to bring him face to face with it, for upon the answer to it rests the very foundation of his separate standing-ground.

What, I repeat, if the statements so solemnly and forcibly made in the Claim of Right have—the greater part of them, the most important of them—no foundation in fact? The great bulk of the ministers, and probably the whole of the laity, who left the Church in 1843 believed these statements to be true, and they left only because they believed

them. The document was sent out to India, and to our other foreign mission stations ; and the missionaries there, accepting it on trust and believing it, separated from the Church. The Synod of the English Presbyterian Church had it transmitted to them ; and they also believing it, adopted it, and entered upon their records an excommunication of all who in such circumstances could continue in a church which had been so treated. The English Presbyterians showed at first, indeed, a caution which did not find imitators elsewhere; but it came to nothing. When asked to adopt the Claim of Right, they inquired, Is it all true? and in order to be informed on that point, they remitted the document to a committee to examine its statements, and to report to a future meeting of the Synod. But the committee, after looking at it, reported that it was impossible for them within the time at their disposal to verify its statements, and they suggested that each member of the Synod should examine it and judge for himself; and so, without further investigation, the Synod accepted it on trust. Thus people in Scotland, the missionaries abroad, and the Presbyterians in England, adopted the statements and conclusions of the Claim of Right, simply because they found them there, and because the leaders of the Non-intrusion party told them that they were all true. I need hardly say that few of the laity ever studied the Claim, or sought to verify its statements; but they were told by ministers whom they trusted that everything stated there had taken place, and that no man with any regard for his soul's welfare could remain in a church which had suffered such things. One of their principal leaders, Dr. Cunningham, did not hesitate to state publicly that those who remained in the Church of Scotland constituted "a synagogue of Satan"; and generally the people were told that they could not remain without renouncing

their allegiance to Christ. It is not surprising that in such circumstances the congregations as a rule followed their ministers in a mass. As regards many of the ministers who told their people this, let us not be hasty in condemning them. The ministers, I have no doubt, believed in the Claim of Right themselves, and they believed it because it was put forth by men whom they trusted, and who assured them that it was true, and that it could not be answered.

I return then to the question—Are the statements in this Claim of Right true? and the answer is that they are not true; that, on the contrary, this celebrated document is full of misrepresentations; and that, on all the important points with which it deals, the facts are either the reverse of what is asserted, or they are so stated as necessarily to convey a false impression of what actually took place. This is a very serious charge, and I am fully sensible of the responsibility incurred in making it. My object is to show that it is well founded, and in doing so I shall endeavour to write calmly and impartially—dealing not with arguments or deductions, but with facts, and so stating them as to enable each reader to form his own judgment.

Let me at the outset state in a sentence what were the circumstances under which the Claim of Right was put forth—avoiding details which will come afterwards. The party which had obtained a majority in the General Assembly previous to 1843 succeeded in passing two Acts—the Veto Act and the Chapel Act. Both were opposed by large minorities. In an assembly of 323 members, the Veto Act was carried by the votes of only 184. A minority of no less than 139 protested against it as *ultra vires* of the Assembly. But no factious opposition was offered, and the State did not interfere. After a time, however, both Acts were called in question—in separate actions—by certain

individuals, who alleged that their civil interests were injuriously affected by them. These parties contended that the General Assembly had no power to pass the Acts in question—that they were opposed to the laws and constitution and practice of the Church itself, as well as to statute law. In both cases these pleas were, after trial, sustained by the Court of Session ; and in one of them, the leading case, the decision was confirmed by the House of Lords. All the other cases arose out of these two. The party represented by the protesting minority was satisfied that in all of them the Court had only exercised its constitutional function of deciding pure questions of law submitted to its judgment, in which civil interests were involved. But the Non-intrusionists—those in the General Assembly who afterwards founded the Free Church—professed different views, and they gave expression to them in language which nothing short of the most criminal disregard of law and justice on the part of the Court of Session could have justified. I may aptly quote here the striking and dignified language of the Lord Chief Justice of England on a recent public occasion.* "One of "the great safeguards of the Constitution," his Lordship said, "has been the confidence of the people in the "purity and integrity of the administration of justice. "Woe to those who seek to undermine that confidence— "to those who, by calumny and vituperation, seek to shake "the confidence of the people in the administration of the "justice of the country." To this grave charge the founders of the Free Church have laid themselves open, if the statements in the Claim of Right are not true. In that document it is averred that in the predisruption cases the Court had acted unjustly ; that it had "invaded the

* Speech at meeting of the Chamber of Commerce in Southampton, 31st March, 1875, as reported in the *Times*.

jurisdiction of the Church"—had "usurped the power of the keys"—had "illegally attempted to coerce the Church Courts"—and had acted "in opposition to the doctrine of "God's Word; in violation of the Constitution of the "country, in defiance of the statutes, in breach of the "Treaty of Union, and in contempt of the laws of the "kingdom." In such terms did the leaders of the party seek to shake the confidence of the people of Scotland in the administration of justice, and to hold up to reprobation and contempt the highest judicial tribunal in the kingdom. And in all this, the Claim of Right adds, the Court of Session had acted in direct opposition to what had been previously decided in the same Court in similar cases.

This grave charge the Non-intrusionists embodied in a document which they laid on the table of the General Assembly in the session of 1842, and which they called a "Claim, Declaration, and Protest anent the encroachments "of the Court of Session"—since commonly called the Claim of Right. This Claim they laid before the Government of the day, and asked for the Church relief and protection against a state of matters which—assuming all that was charged to be true—was certainly altogether intolerable. The Government considered what was demanded to be unreasonable and unconstitutional, and declined to interfere. And thereupon the "disruption" took place.

Now the question I am to consider is, Did the Court of Session really act in the manner alleged? On the answer to that question this Claim of Right stands or falls. It is important to keep this in view, because, although the Claim recites numerous statutes, and refers to ever so many decisions, it ends with asking nothing but this—freedom for the Church to enjoy her liberties and privileges

"*according to law*," and "protection therein from the fore-"said unconstitutional and illegal encroachments of the "Court of Session." It does not ask that the Veto Act or the Chapel Acts should be confirmed by Act of Parliament. It does not ask that patronage should be abolished. It only asks that the State should interfere in favour of the claims put forward by the Non-intrusionists, and against the jurisdiction of the Civil Courts; and because the State declined to interfere, that party left the Church of Scotland. If, therefore, it can be shown that the Court of Session did *not* do what it is accused of doing, and that it did not act illegally and unconstitutionally, the Claim of Right falls to the ground.

Now, let us examine this Claim. The opening sentence —the preamble, as the lawyers would call it, on which all that follows rests, sets forth that, notwithstanding the securities of the government and liberties of the Church "provided *by the statutes of the realm, by the constitution of this country*," and by the coronation oath, "these have been "of late assailed by the very Court to which the Church "was authorized to look for assistance and protection, to "an extent that threatens their entire subversion." I quote this in order to call attention to the all important fact that what is claimed is rested not upon any inherent "spiritual independence" in the Church, but on her rights as recognized by statute and secured by the laws and constitution of the kingdom. It is impossible to exaggerate the importance of the principle thus conceded, for if, as is here broadly admitted and asserted, all that the Non-intrusionists demanded before 1843, was what had been secured to them by statute and common law, then it follows that in every one of the questions which arose, the legitimate and the only competent tribunal to decide upon the measure of the

rights claimed was a court of law. It equally follows that, in exercising its judicial function of deciding such questions, the Court of Session did not "invade the jurisdiction of the Courts of the Church," as the Claim of Right asserts it did; for in none of the cases did it do anything more than interpret the law and the statutes of the realm, when required to do so—a function which it will not be pretended belonged in any way to the Church Courts.

Following up this important preamble, the Claim of Right proceeds to set forth the statutes by which the rights and the constitution of the Church are defined, including the Confession of Faith, which it takes care to explain is itself an Act of Parliament, being "recognized, ratified, and confirmed by Parliament," and embodied in the treaty of Union. And it bears expressly that the "exclusive jurisdiction" claimed by the Church is that which has been, "by diverse and repeated Acts of Parliament, recognized, ratified, and confirmed." Then the Claim goes on to assert that "diverse civil rights and privileges "were, by various Acts of Parliament, secured to the "Church"; and various Acts are cited as those which conferred these rights. Thereafter the Acts of Parliament relating to patronage are recited, including the Act of Queen Anne (10 Anne, c. 12).

It is unnecessary to discuss the terms of these statutes. They speak for themselves. I would only repeat that the very fact that they are cited at all, coupled with the admission in the Claim of Right that no exclusive jurisdiction is claimed for the Church other than what had been ratified and confirmed by these Acts of Parliament, at once negatives the assertion that the Civil Courts—the sole interpreters of statutes—had, in judging of the cases submitted to them which fell to be decided

by the terms of these Statutes, invaded the jurisdiction of the Church. The Civil Courts might, of course, err in judgment, for no human tribunal—Church Court or Civil Court—is infallible. In one of the cases—an interdict granted in absence, but which was never enforced—it did err; but that does not affect the question. If the Court of Session did nothing more than judicially decide the cases brought before them, according to "the statutes of the realm and the constitution of this country," under which alone any right was claimed for the Church, the charge that the Court had stepped beyond its province, and had invaded the spiritual jurisdiction of the Church, falls to the ground.

After reciting the statutes, the Claim of Right proceeds to set forth the principle of Non-intrusion; and the Veto Act is described from the point of view of the Non-intrusionists.

After this narrative, the Claim proceeds to make this statement: "That by a judgment pronounced by the "House of Lords, in 1839, it was for the first time "declared to be illegal to refuse to take on trial, and "to reject the presentee of a patron (although a layman, "and merely a candidate for admission to the office of the "ministry), in consideration of this fundamental principle "of the Church and in respect of the dissent of the con-"gregation." This is the only place in the Claim of Right in which this judgment is referred to, and the passage stands alone as a statement that a particular Act of the Church had been pronounced by the House of Lords to be illegal.

Now this—taken with its context—is an important passage in the Claim of Right. The judgment referred to in it was that which was pronounced in the first Auchterarder case, by which it was decided, after exhaustive

discussion—first in the Court of Session, and then in the House of Lords—that the Court of Session had jurisdiction to entertain an action complaining of the illegal refusal of a Presbytery to take a presentee on trial, to the effect of vindicating the civil rights of the patron and presentee; and that the Presbytery of Auchterarder had, in refusing to take the presentee on trial on the sole ground of the Veto Act, acted illegally and contrary to the statutes recited in the Claim of Right, and particularly the Act 10 Anne, c. 12. The ground of the judgment was, that the General Assembly had exceeded its powers in passing the Veto Act, and that a patron or presentee, whose civil rights were defeated by it, must necessarily be entitled to the protection of the Civil Courts.

This first Auchterarder case was the one according to the principles settled in which all the cases which followed arising out of the settlement of ministers were decided—just as all questions which arose regarding the erection of parishes and the legal constitution of Church Courts were decided by the judgment in the Stewarton case.

I have said that the passage regarding the decision of this first Auchterarder case which I have quoted from the Claim of Right is an important one. It is important in this, that while in every one of the decisions subsequently cited, the Court of Session is accused of having invaded the jurisdiction of the Church, and acted in defiance of statute and in contempt of law, there is not one sentence in the Claim which asserts that the Courts went beyond their legitimate province when they decided, in the first Auchterarder case, that to refuse to take on trial the presentee of a patron was illegal. On the contrary, it recognizes the decision as one which settled the law as regarded every civil right and interest. The Claim of Right expressly

states accordingly that, so far as the decision affected civil rights, the Church "bowed to its authority."

This, then, is not a decision of which the Claim of Right complains. The only decisions in which the Court of Session is accused of acting illegally and unconstitutionally are those which were subsequently pronounced, "pending "the efforts of the Church to accomplish *an alteration of* "*the law*."

I may here remind the reader of what is well known in the history of this controversy, that among some of the best and ablest of the Non-intrusion party, serious doubts existed as to the power of the Church to pass the Veto Act; and it will be remembered how often the Free Church party have stated in defence of their action in passing that Act that—notwithstanding that they claimed to be the interpreters of the mind of Christ in such matters—they had taken legal advice on the subject. No one doubted their good faith in passing the Act, and they certainly adopted a wise and prudent course in taking legal counsel before they passed it. The event proved that the lawyers they consulted were wrong, just as in many other cases it is found that the advice given by counsel to the disappointed litigants has been erroneous. But why consult lawyers about it at all? The answer is obvious. It was because they knew that the question of their power to pass it at all was a pure question of law. They must have felt, therefore, that when the question was tried and decided against them, they had no alternative but to acquiesce in the decision, and to "bow to it," as one which the Courts of Law had jurisdiction to pronounce.

But if it did fall within the legitimate function of the Courts of Law to judge in the case, why did the Non-intrusion party refuse to give effect to the judgment by repealing

the Veto Act? It was their refusal to do so that caused all the misery. The Claim of Right asserts that they did give obedience to it as regarded all civil consequences; but this is not the case, for in regard to the most important civil consequences they set it at defiance. The words of the Claim are: "To the authority of which judgment, so far as "disposing of civil interests, this Church implicitly bowed." But how? "By at once abandoning all claim to the jus "devolutum—to the benefice for any party to be settled "by her—and to all other civil right or privilege *which* "*might otherwise have been competent to the Church* or "her Courts."

But why limit the submission to civil rights competent to the Church? There were other civil rights and interests involved in the judgment, and these of a far higher and more important kind than the *jus devolutum* or the benefice—not to speak of the absurdity of making a merit of abandoning any claim to what, after the judgment, could in no possible circumstances be available to "the Church." What about the civil rights of the patron whose right of patronage was rendered valueless? What about the civil rights of the presentee who was kept out of the benefice, and whose prospects were blasted by the refusal of the Presbytery to take him on trial? And if these interests could be thrown aside, what about the still higher and more important civil interests involved in providing a minister for a vacancy in one of the parishes of Scotland, and filling a vacant place in the Presbytery—a court empowered and bound by statute to exercise certain important judicial functions in civil causes? On their own admission, the Presbytery could not supply the vacancy—either in parish or Church Court; for the only way in which a Presbytery *can* do this is by the exercise of the *jus devolutum;* and that right never can come into operation unless the patron

has failed to present. The only other way in which the vacancy *could* be supplied was by disregarding the Veto Act, and taking the presentee on trial; and this the Non-intrusion party refused to do. The parish, therefore, would remain vacant, and a Court of the Church would be deprived of one of its members, to the detriment or rather to the entire sacrifice of most important civil interests.

In refusing, therefore, to repeal the Veto Act, the Non-intrusionists did *not* bow to the decision of the House of Lords, "so far as disposing of civil interests." They overlooked the fact that the duty of the Presbytery to fill a vacant parish was a civil duty, and that, apart altogether from the civil loss sustained by the patron and presentee—although that also was involved—it was a duty, incumbent on them officially, to supply the vacancy according to the law of the Church—in the way, that is, in which they would have supplied it but for the Veto Act, and by which alone it *could* be supplied, now that that Act had been declared illegal. They overlooked, in short, the fact that the filling up of vacant parishes by inducting ministers not only involved important civil interests, but was *a ministerial duty* which, by accepting office in the Church, they had undertaken to perform, "according to law," and in regard to which, therefore, they had no option. As Lord Mackenzie truly observed, when giving judgment in the Lethendy case: "The effect of the decision "in the Auchterarder case was that, although the acts of "the Presbytery in regard to the admission of ministers, "such as the taking the party on trials, the inquiry into his "qualifications, and his final admission, are ecclesiastical "acts exclusively within the functions of the Presbytery, "the question *whether or not the Presbytery is bound* "*ministerially to enter into that course of procedure*, and to

"exercise its ministerial functions in regard to them, *is a* "*civil question* which the Court of Session is entitled to "entertain and to decide upon." In the Auchterarder case the Presbytery refused to exercise this ministerial function. The House of Lords decided that in so doing they acted illegally; and therefore if they really meant to "bow "implicitly to that judgment so far as disposing of civil "interests," there remained no course open to them but to exercise the ministerial function of taking the presentee on trial—that being the *only* way by which the parish of Auchterarder could be supplied with a minister, and by which the vacant seat in the Presbytery could be filled. But they continued to refuse, and in so doing they set the judgment of the House of Lords at defiance as regarded the most important civil interests which were involved in it. Out of that refusal all the subsequent trouble arose; and let it ever be kept in view that in every judgment which the Court pronounced in these subsequent cases they did no more than carry out the principles of the Auchterarder judgment to their legitimate consequences; and that in every one of them the Court exercised its judicial function because of the civil rights and interests in regard to which its protection was sought, and because of these alone.

Having stated the decision in this case, by which it was declared to be illegal to refuse to take on trial the presentee of a patron in consideration of the Veto Act, and having stated it, too, as a decision which must bind the Church in all civil matters, including, as I have shown, the very act itself of taking the presentee on trial as a civil obligation, the Claim of Right goes on to admit that the consequence of the decision would be to effect "a separation between the cure of souls and the benefice thereto attached." It ought to have added that, if the decision was disobeyed in this and other instances, the whole machinery of the

Church would be brought to a dead-lock, and the Church of Scotland itself would necessarily become extinct. The Non-intrusionists indeed saw this, and the Claim of Right virtually admits that such a result could only be averted by "an alteration of the law"—meaning by that that the law should be altered to meet their views.

Here, then, is the first misleading statement in the Claim of Right, for the only impression made on the general reader must be that in every matter of civil right—in every matter, that is, with which a Civil Court could competently deal—the Church had given obedience to the decision in the Auchterarder case; whereas the fact was the reverse—the Church having defied the law, and refused obedience to the judgment in regard to various civil rights of the very highest importance.

Such being the general character of this Claim and the circumstances in which it was made, I now pass to that important part of it which deals with the decisions of the Court, and what I am about to show is, that the Court of Session—against whose misdoings the whole document is directed—did *not* do what the Claim of Right alleges it did. If I succeed in showing this, the whole Claim, as I have said, necessarily falls to the ground, for it concludes with nothing but a demand that the Church shall be protected "from the foresaid unconstitutional encroachments "of the Court of Session, and her people secured in their "Christian and *constitutional* rights and liberties," that is, as elsewhere expressed in the Claim, that they be allowed to enjoy their liberties and privileges "*according to law*."

The Claim of Right first proceeds to found an argument on certain earlier decisions—contrasting what the Court did in these cases with what it did in those of a later date In these earlier decisions, the Claim asserts, the Court of Session "never attempted or pretended to direct or coerce

"the Church Courts in the exercise of their functions in "regard to the collation of ministers," but, on the contrary, "limited their decrees to the regulation and disposal of the "temporalities which were derived from the State, and "which, as the proper subject of actions civil, were within the "province assigned to the Court of Session by the constitu- "tion ; *refusing to interfere* with the peculiar functions and "exclusive jurisdiction of the Courts of the Church. Thus:—" and then follows what professes to be an account of the different cases in which it is said this was done. Of course, in no case did the Court of Session ever interfere with the legitimate exercise of the functions and jurisdiction of the Church Courts ; but the inference conveyed by the state- ment in the Claim of Right is that, even in cases where the Church Courts had acted illegally, the Court of Session limited the exercise of its jurisdiction to the disposal of the temporalities, and "refused" to judge as to any- thing else. But such was not the case. I have not space to refer to all the cases, but those I shall cite will more than bear out what I have stated.

The first is the case of Auchtermuchty.* "In this case," says the Claim of Right, "where the Presbytery had "wrongfully admitted another than the patron's presentee, "the Court found that *the right to a stipend* [the italics are "in the Claim of Right] is a civil right, and *therefore,* that "the Court have power to cognosce and determine upon "the legality of the admission of ministers *in hunc effectum*, "whether the *person admitted* shall have right to the *stipend* "or not ; and simply decided that the patron was entitled "to retain the stipend in his own hands."

This case, it will be observed, is quoted in proof of the assertion that the Court "refused to interfere" with any thing but the stipend, and "simply decided" as to that.

* Moncrieff *v.* Maxton, 15th Feb., 1735.

But the fact is, that *the only matter* before the Court was a claim for the stipend. The ground of the claim was that the settlement of Mr. Maxton by the Presbytery, in the face of a presentation by the lawful patron, was illegal; and the question which Maxton raised was, whether the judgment of the Church Courts was not final. It was plainly impossible for the Court to entertain and sustain this claim without examining the grounds of it. But did the Court refuse to consider the objections to Mr. Maxton's settlement by the Presbytery? On the contrary, it considered them, and sustained them, and found that the patron had right to retain the stipend, "as in the case of a vacancy." The words quoted are significantly omitted in the Claim of Right. As the only matter before the Court was the right of the patron to retain the stipend, the decree of the Court was necessarily limited to that. But on the very same principle on which they decided for the patron, they would have decided for the presentee, had he been a party, as they did in the Auchterarder case. They would have ordained the Presbytery to proceed with the settlement, and on their refusal to do so, would have found them liable in damages. In this case, then, the Court did not do what the Claim of Right asserts it did.

Another of the cases instanced in the Claim of Right as one of those in which the Court of Session in former times "refused" to interfere in anything beyond the regulation and disposal of the temporalities, was that of Culross;* but neither in that case is it true that there was any such refusal. As in the Auchtermuchty case, the only question was one as to the stipend between the patron and a minister settled by the Presbytery—the patron claiming it on the ground that the Presbytery had acted illegally in the settlement. Stoddart, the party inducted,

* Cochrane *v.* Stoddart, 26th June, 1751.

resisted the patron's claim. He demanded the stipend as inseparable from the cure, and contended that the Court had no jurisdiction to inquire into the legality of his admission. But the Court decided, as before, that they *had* jurisdiction, and having found that the proceedings of the Presbytery in filling up the vacancy had been illegal, they "preferred the patron." They treated the whole proceedings of the Presbytery, in short, as absolutely null, and their decree accordingly was, that the patron should be entitled to the stipend, "aye and until the vacancy should be legally supplied." It is clear from the principles on which the Court proceeded in this case, that had the presentee appeared to prosecute *his* claim, the Court, so far from refusing to interfere, would have given the relief asked. Equally clear is it that if the heritors had thought fit to appear, the Court would, at their instance, have excluded the intruder from the use of the church, and from the manse and glebe (as they did in the case of Unst, to be presently noticed), and that they would also (as in the case of Stewarton) have interdicted him from sitting in the Presbytery. Yet it is asserted in the Claim of Right that in this case the Court "refused" to go into these questions. As regards the heritors, the incumbent anticipated any action on their part, for, as might have been expected, on finding he was to get no stipend, he demitted his charge within a year after the decision—verifying in this his own plea, that for all practical purposes "the stipend is inseparable from the cure."

The Case of Unst* is another of the same class of decisions. It is quoted in the Claim of Right, like the two already noticed, to prove the assertion that the Court "never attempted to direct the Church Court in the exercise of their functions"; but, on the contrary, "refused"

* Lord Dundas *v.* Presbytery of Zetland, 15th May, 1795.

to judge in such matters. The case is thus cited in the Claim: "So, in the same manner, in the case of Unst, *when* "*the party concluded to have the Presbytery ordained to* "*proceed to the presentee's settlement,* as well as to have the "validity of the presentation and the right to the stipend "declared, the Court *limited their decree* to the civil matters "of the presentation and stipend." But, incredible as it may appear, the facts were the reverse. The pursuer obtained all that he asked—namely, decree in terms of the declaratory conclusions of the libel. The summons had contained rescissory conclusions for setting aside the procedure of the Presbytery, but these the pursuer departed from—the declaratory conclusions being quite sufficient for his purpose. These conclusions were "that the Presbytery "of Zetland should be ordained to give due obedience to the "presentation, *and to proceed to the settlement* of the said Mr. "John Nicholson, according to the rules of the Church; and "until the conclusion of the process to follow thereon, *and* "*that the said Mr. John Nicholson shall be settled in the* "*said church and parish,* it ought and should be found "and declared that the pursuer and the other heritors, "liable in stipend, are entitled to retain and uphold the "same, and to prevent the said Archibald Gray from taking "possession of the manse, glebe, or other rights and privi- "leges belonging to the minister of said parish."* And in these terms the Court gave decree. To afford another illustration of the impracticability of separating the cure from the temporalities, the presentee in this case followed the example of the minister of Culross, by demitting his charge within a few months after the date of the decree.

After citing these cases as examples of the "refusal" of the Court to entertain any questions but such as related to

* Bell's fol. Cases, p. 170. Robertson's Report of Auchterarder Case, I, p. 323.

the temporalities, the Claim of Right proceeds to adduce this additional instance in support of the same assertion: "So, further, in the before mentioned case of Culross, the "Court refused 'as incompetent' a bill of advocation pre- "sented to them by the patron for the purpose of staying "the admission by the Presbytery of another than his own "presentee."* Here the obvious meaning conveyed to the general reader is that the Court of Session refused to judge as to the legality of a Presbytery's proceedings in a matter of induction. But, on referring to the case, it will be found that the one and *only* ground of the Court's judgment was, that the matter had been brought before it in an incompetent form, namely, by a bill of advocation—the Court in this confirming, what has never been disputed, that there is no *appeal* from an Ecclesiastical to a Civil Court—an advocation being the form adopted in appeals. Had the patron brought his action in the proper form, the Court would unquestionably have heard the case. This the framer of the Claim of Right, as a lawyer, could not fail to know; yet he so puts it as necessarily to lead to the inference that the Court had, on principle, considered itself powerless to interfere in the case of a settlement threatened to be made contrary to law.

The reader will be already able to judge from these instances what faith is to be placed in the statements in the Claim of Right. In every one of them, it will be seen, it is untrue that the Court of Session did what the Claim avers it did. But instances of misrepresentation far more serious remain to be noticed.

Having adduced these examples of what the Claim untruly says the Court refused to do in earlier times, out of respect to the rights of the Church, it proceeds to notice another class of cases—those, namely, which occurred shortly before 1843.

* Cochrane, 19th November, 1748.

in which it avers the Court, reversing its former line of conduct, acted in disregard and violation of the Church's rights.

The averment is that in this class of cases the Courts of Law, not confining themselves to matters which affected civil interests, "stepped beyond the province allotted to "them by the constitution—deciding not only 'actions "civil,' but 'causes spiritual and ecclesiastical,' and that, too, "when these had no connection with the exercise of the "right of patronage." This, it is averred, the Court did "by interdicting Presbyteries of the Church from admitting "to a pastoral charge, *when about to be done irrespective of* "*the civil benefice* attached thereto; or even where there "was no benefice, no right of patronage, no stipend, no "manse or glebe, and no place of worship, *or any patrimonial* "*right connected therewith.*"

Now if the Court of Session really did this—if the act of the Presbytery in these cases was of a purely spiritual character, and did not affect any civil interest—the action of the Court of Session was one of intolerable tyranny and injustice; for that Court has jurisdiction in *no* case in which a civil interest or patrimonial right is not involved. Let us see whether the charge be true.

The two principal cases cited to prove it are the first Lethendy case and the Stewarton case.

To begin with the Lethendy case. So far from having "no connection with the exercise of the right of patronage," as stated in the Claim of Right, this case arose entirely out of a question of patronage. A question had arisen, which of two presentees had the legal civil right to claim induction; and pending an action raised by one of them to establish his claim, the Court, on his application, and in order to protect the civil right, ordained the Presbytery to delay proceedings till it should be ascertained which had the legal right. The Presbytery, however, in

defiance of the order of the Court, inducted the other. When the case came before the Court on a complaint, the Presbytery sought to shelter themselves under the plea that they had only appointed to the spiritual charge, and had done nothing which could affect any civil right. This plea the Court at once repelled as untenable, because opposed to the palpable facts. The Lord President said : "The act of induction of Mr. Kessen was as regular and "formal an investiture of him, with the full status and "rights of a parochial minister as the Presbytery could "possibly confer, including the addition of his name to the "roll of the Presbytery, which could only be done as the "parochial minister. The act of the Presbytery, therefore, "was *not* of a purely ecclesiastical character, *but directly* "*interfered with the temporalities of the benefice.*" Dr. Rainy and his party in the Free Church are in the habit of quoting Lord Cockburn as expressing sound views in these predisruption cases. Let us see what Lord Cockburn, sitting as a judge, said in this Lethendy case. By the induction, he said, *they have given to Mr. Kessen "a right "to claim the stipend.* By enrolling him as a member of "Presbytery *they have given him a vote in several civil "matters* touching schools and manses ; and I am not sure "that they have not given him the benefit of the Widows' "Fund. *These civil privileges followed the induction.*" And Lord Fullerton—whose opinion is of peculiar value, as he had been in the minority in the Auchterarder Case, said : "Above all, it seems to me clear that we can and ought, "when necessary, to interdict the Presbytery *from the "commission of civil wrong*, by proceeding without pre- "sentation, or upon bad and illegal presentation, to the "prejudice of those truly having right as patrons or "presentees. To such interdict there can, I think, be no "objection, except such want of jurisdiction in this Court

"as makes it incompetent for us to take cognizance of "the conduct of Presbyteries in regard to the matter of "patronage altogether. But after the case of Auchter- "arder, that want cannot possibly be held to exist. . . . If "we can interdict in any case, we must have jurisdiction "to interdict whenever there are good grounds for an "interdict, to prevent wrong by the invasion of the right of "patronage, or to prevent apparent danger of such wrong. "And if that be true, then there manifestly was jurisdiction "to grant an interdict in the present case."

Yet the framer of the Claim of Right—himself a lawyer, and intimately acquainted with the details of this case—made the Claim of Right assert that, in the Lethendy case, the Court of Session stepped beyond its province, and exercised its jurisdiction in a matter where no civil right was involved, And because the Claim of Right asserts this, Free Church ministers continue to assert it. Thus, in a recent paper by a Free Church minister of Dr. Rainy's party—one of a series of publications bearing to be for the information of "our people"—the author, Dr. Blaikie, echoing the Claim of Right, asserts that "the Civil Courts interdicted Pres- "byteries from ordaining men to the charge of souls, even "though, as in the Lethendy and Stewarton cases, *there* "*was no question involved of stipend, manse, or glebe, or any* "*temporal interest whatever.*" The italics are Dr. Blaikie's. I do not blame him for making the assertion. He found it in the Claim of Right, and did not know that it was untrue. That it is absolutely untrue as regards the Lethendy case I have shown. That it is equally untrue as regards the Stewarton case will be shown presently; yet, this was in the Claim of Right made one of the grounds of charging the Court of Session with judging in a case which involved no civil or patrimonial

right, and thereby "invading the spiritual privileges of the "Church in violation of the constitution of the country, "in defiance of the statutes, and in contempt of the laws "of the kingdom."

It is asserted in the Claim of Right that, in the Stewarton case, the court was guilty of the same unconstitutional conduct by interdicting Presbyteries from admitting to a pastoral charge "irrespective of the civil benefice," and when "there was involved no patrimonial right connected therewith"; and by "granting interdict against the establish-"ment of additional ministers to meet the wants of an "increasing population."

To begin with the last of these charges. The only meaning conveyed by the averment is that, when a Presbytery had proposed to do nothing more than provide a minister to supply the wants of an increasing population, the Court of Session arbitrarily interposed and interdicted them from doing so. Now this was a very serious charge, and one above all others calculated to excite the feelings of the people of Scotland, and to induce them to leave a church on which such an outrage could be inflicted with impunity. For every man in Scotland knew that for a long series of years it had been the practice of Presbyteries to sanction, without question, the erection of *quoad sacra* churches, and it was known also that in this way "the wants of the increasing population" had, by the appointment of ministers, been largely met, and a great amount of good accomplished. Yet, here—if the Claim of Right is to be believed—the Court of Session, in defiance of law, and in disregard of the known rights of the Church, and of a long established practice, had arbitrarily and tyrannically interdicted the establishment of these additional ministers.

Is it true? It is not true. There is not a word of truth

in it. The Court of Session did not in one single instance grant such an interdict, and certainly they did not do so in the Stewarton case.

The true state of the matter was this: The Courts of the Church, not content with following the mode previously practised for supplying the wants of increasing populations —not content with providing a church and ordaining a minister to preach in it—a course of which, as it did not infringe the constitution of the Church, and interfered with no civil or patrimonial right, no one had ever complained, or had a right to complain, and in which, being a purely ecclesiastical matter, the Courts of Law had no jurisdiction to interfere—the Church Courts, I say, not content with doing this, passed a series of Acts, entirely new in the history of the Church, by which there were given to the ministers of these *quoad sacra* churches seats in Presbyteries, with kirk sessions, the members of which were also admitted as members of Presbytery. In this way existing parishes were dismembered in order to assign to the new minister a parochial district, and he was invested with all the rights and privileges of an ordained parish minister, the legal endowment only excepted. By these Acts civil interests were directly affected. The ministers and elders so admitted were assigned seats in a Court which, by statute, has the right of judging in important civil matters affecting churches, manses, and glebes; and, among others, there was conferred on them the civil right of taking part in presentations to vacant livings by the exercise of the *jus devolutum*.

The heritors and parishioners of Stewarton—parties having a say in the matter, under the constitution of the Church, as much as the Presbytery had—objected to this arrangement as unconstitutional. They had no objection to any number of chapels being erected, or to any number of ministers

being ordained "to meet the wants of the increasing population," but they objected to this being done in an illegal way. They objected to the parish of Stewarton being divided, and they objected to plead before a Court illegally constituted; so they asked the protection of the Court against it, and they got it. "It is clear," said the Lord President, "that the Church, by its own authority, cannot "authorize the members of what are called *quoad sacra* "parishes to perform those duties which, *as directly con-* "*cerning civil rights*, the law has only devolved upon the "legally constituted ministers of the Presbyteries of the "Church." That the Court of Session had jurisdiction to entertain a question so directly affecting civil interests it requires no argument to prove. Yet the Claim of Right proclaimed to the people of Scotland that in so entertaining it and judging on it, the Court had gone beyond its province, and had invaded a "spiritual privilege" of the Church, by granting interdict against the performance of a purely spiritual act, in which no civil right was involved.

There was something peculiarly disingenuous in the assertion thus put forth in the Claim of Right that, in the Stewarton case, the Court had judged in a matter in which it had no jurisdiction; for when they were before the Court the party used very different language. They never for a moment pretended there that the Church Courts had any warrant for passing the Chapel Acts, unless they had it by statute. I give their plea in the words of the Lord Justice Clerk when giving judgment—the italics being those of his Lordship in the printed report revised by him. He said: "The leading counsel for the Respondents (the Presbytery), "in his argument at the bar, *expressly* disclaimed the notion "that the jurisdiction claimed by the Church *could rest on* "*any other foundation than on the statute law of the land.*" And again: "He (the counsel for the Presbytery) anxiously

"declared that he rested the powers contended for solely "on the authority of the Acts of the Legislature in reference "to the Church." But, if so, what tribunal but a Court of Law could decide as to the meaning of the statutes, when that meaning was disputed by two parties, the one as much entitled to the benefit and protection of the statutes as the other? The plea of the Presbytery, his Lordship added, "that although the power is claimed "in virtue of statute alone, yet whatever violation of "statute may be committed—whatever civil wrong done "—whatever may be the usurpation of power, and however "fundamental the changes made in the constitution of the "Church, still the Supreme Court cannot declare the "illegality, and prevent the wrong, is a proposition to which "assent cannot, on legal principles, be seriously entertained."

The assertion in the Claim of Right, therefore, that the Court in this case "interdicted the establishment of addi- "tional ministers to meet the wants of an increasing popu- "lation"—an assertion broadly made, without qualification, and without a word of explanation—is without a shadow of foundation. The right of the Church to provide any amount of additional church accommodation was not, as I have said, for a moment disputed. The only question at issue was whether the Church Courts were entitled to do this in a manner unknown in the Church's history and constitution, and in direct opposition to statute law. "The "species of parish proposed to be erected," the Lord Justice Clerk said, "was unknown to law; the erection of new "parishes could only take place in virtue of authority "flowing from statute; and the whole history of the appli- "cation to Parliament for the erection of parishes before "1621 and 1633 serves to prove that the Church had not "the power now claimed, and that the Presbyteries of the "Church are composed of parish ministers and elders from

"legal kirk sessions." And Lord Wood observed that "the Presbytery of Irvine had no power to proceed in the "erection of a parish in the manner proposed, simply for "this reason, that it involves a change in the constitution "of the Church." Yet although unknown to law, and although notoriously the procedure complained of had never been practised in the Church of Scotland previous to the Chapel Act of 1833, the Claim of Right makes the astounding assertion that what the Court granted interdict against in the Stewarton case had been "uninterruptedly practised from the Reformation to this day"!

Such was the Stewarton case—the case adduced to prove the assertion in the Claim of Right that, in the important matter of supplying ministers to destitute populations, the Court of Session had *interposed* to prevent it, and had trampled on the spiritual rights and functions of the Church, in a matter in which no civil right or interest was involved.*

The case of Marnoch, in the Presbytery of Strathbogie, is next cited as another instance of the Court coercing a Presbytery in a matter purely spiritual. The assertion made in the Claim of Right is that, in this case, the Court issued a decree requiring a Church Court to take on trial a presentee, and to intrude him on the congregation, contrary to the will of the people—thus "invading the Church's exclusive juris-"diction in the admission of members *recognized by statute*."

How the decree in this case should be objected to as *ultra vires* of the Law Courts, when the decision in the Auchterarder case is not so objected to, I do not understand; for the one decision proceeded on the same principles as the other, and was a necessary consequence of it. The refusal of the Presbytery to perform the ministerial duty of

* Parishes are being constantly erected, whose ministers have the full status of other parish ministers—220 since 1843—18 within the last year.

taking the presentee on trial had, as we have seen, been declared illegal by the judgment of the House of Lords, and the Non-intrusionists had professed to bow to the decision so far as civil interests were concerned. But here the very same question was involved. The presentee who had been in the first instance rejected under the Veto Act had raised an action similar to that in the Auchterarder case, and had obtained a judgment finding that the rejection was illegal, and another judgment finding that the Presbytery was "bound and astricted" to take him on trial, and, if found qualified, to receive and admit him according to law. These judgments had been acquiesced in, and had been intimated to the Presbytery, who, by a majority of seven to three, had thereafter sustained a call, and resolved to proceed with the trials. For doing this the majority of the Presbytery had been illegally suspended by the Commission of Assembly; and the Court of Session, on being applied to for protection, had granted interdict against the suspension being carried into effect. It was in this state of matters that the Presbytery, on being required to proceed, superseded consideration of the matter, and the presentee raised another action to have them ordained to admit and receive him according to law, and to take the necessary steps for that purpose; with an alternative conclusion for damages if they refused to do so. The majority of the Presbytery appeared, and admitted that they could not resist decree. They stated in effect that they were satisfied that, as a Court of the Church, they *were* bound to do what was required of them, but that they were coerced by the order of the General Assembly. As important civil rights were involved, the Court had no option but to entertain the application; and with the decision of the House of Lords in the Auchterarder case before them as an authority which it behoved them to follow, there was only one course

open to them. Accordingly, after hearing the minority, they granted the prayer of the presentee, and ordained the Presbytery to proceed. "We cannot ourselves ordain," the Lord President said, "but we can ordain the Presbytery to do its duty." Or, as Lord Mackenzie observed in another case,* "It would be no answer to say to us, You are not "ecclesiastical, you cannot ordain. The answer would be, "No ; and for that reason we ordain you to do it, as you "agreed to do." The soundness of these views is obvious. The members of Presbytery had undertaken at their ordination to execute the ministerial functions pertaining to their office, including the duty of filling vacant parishes according to law. The majority felt that they were bound to do what they had thus undertaken, and they were satisfied that they could not be relieved of the obligation by an order which, although proceeding from a superior Church Court, had been judicially declared to be illegal and *ultra vires*. And indeed they were no more bound by it than they would have been bound by an order proceeding from a corrupt Assembly prohibiting them from sitting in the Presbytery, and from exercising their function of judging there in these matters of civil right which fall under the cognizance of that Court. The majority was satisfied also that, in discharging a civil duty—which taking the presentee on trial was—in obedience to the order of a civil magistrate (apart altogether from their own convictions of duty), they were only following the views of the fathers of the Church. One of the most eminent of these old Reformers, Gillespie, had written†: "As Church officers they are to "be kept within the bounds of their calling, and compelled, "if need be, by the magistrate to do those duties which by "the clear Word of God and received principles of religion, "or by the received ecclesiastical constitutions of that

* Culsalmond. † *Aaron's Rod*, p. 176.

"Church they ought to do." They accordingly did what they believed to be their duty, and they did it not the less readily that their own convictions of what was right were fortified by judicial sanction. All these important facts—the civil rights of the presentee involved in the case, the civil obligation on the part of the Presbytery to fulfil a ministerial function, and the concurrence of the Presbytery itself represented by its majority—all this is kept back in the Claim of Right, and all that is conveyed is that the Court of Session had unwarrantably interposed in a matter purely spiritual, and had compelled a Court of the Church to intrude a minister on a congregation contrary to the will of the people. Whether the settlement was or was not expedient was a matter with which the Court had nothing to do, and into which it had no right to inquire. It was simply asked to decide in a question of law: in a matter, moreover, in which the law had just been declared by the House of Lords. In a question depending admittedly on the construction of statutes, and in which civil rights were concerned, it was bound to do this; and it did no more than this. The accusation made against the Court, therefore, that it "invaded the Church's jurisdiction in the admission of ministers *recognized by statute*" is the very reverse of the truth.

Another instance adduced in the Claim of Right in support of the allegation that the Court of Session had invaded the jurisdiction and spiritual privileges of the Church, by judging in causes purely spiritual and ecclesiastical, is what is known as the second Strathbogie case. The charge made is that the Court had "suspended Church censures inflicted "by the Church judicatories in the exercise of discipline, "and so reponing ministers suspended from their office to "the power of preaching and administering ordinances, "thus assuming to themselves the 'power of the keys.'"

This case was a branch of the one just noticed, in which the majority of the Presbytery of Strathbogie had, in the circumstances explained, sustained Mr. Edwards' presentation, and resolved to proceed with the settlement. For doing this the Non-intrusion majority in the Commission and General Assembly first suspended, and afterwards deposed them from the office of the ministry. They had held the majority of the Presbytery to be guilty of contumacy in giving obedience to the law, as settled in the Auchterarder case, and to the decisions which had been pronounced in the action at the instance of the presentee. This the Court held to be manifestly *ultra vires* and illegal, and, as farther proceedings were threatened against the majority on account of their obedience to the law—including the illegal invasion of their churches and parishes by persons appointed by the Commission to take their places —the Court held itself bound to protect them against such an outrage on their civil rights. The Court did not *repone* them, and did not require to do so, as their suspension from office was held to be an absolute nullity.

The Constitutional party in the Assembly opposed the harsh and extreme measure of the deposition of these gentlemen, Dr. Cook moving: "That the whole had ori-"ginated from the said ministers having yielded obedience "to the supreme civil tribunals of the kingdom, *in a* "*matter declared by the tribunals to relate to civil rights*, "with which the Church requires that its judicatories "shall not intermeddle." But the violent counsels of the dominant party prevailed, and the majority of the Presbytery were obliged to seek the protection of the Court.

This act of the Assembly, by which these members were sought to be deprived of their stipends, their manses, and their glebes, and to be prevented from exercising in the Church Courts judicial functions affecting civil interests,

is what is characterized in the Claim of Right as simply an act of Church discipline, exercised in a purely "spiritual and ecclesiastical matter," an act involving no civil consequences, and from which, therefore, the jurisdiction of the Court of Session was excluded. So far from this being the case, it was, from first to last, so far as the action of the Court of Session was concerned—and it is with the Court of Session alone that I have here to do—a question affecting civil rights, on which it was their peculiar province, as it was their duty by statute law, and by the common law of the kingdom, to sit in judgment. Yet for so judging in it the Claim of Right—withholding, as in the other cases, all explanation—accuses the Court of tyrannically oppressing the Church, of "encroaching on her *spiritual* privileges," and of acting "in defiance of the statutes, and in contempt of the laws of the kingdom." It is inconceivable that any one should have used this language who was acquainted with the actual history of the decision and the opinions of the judges who pronounced it. These were overlooked in the heat of the struggle in which the Church Courts imagined themselves to be engaged. But nothing can be clearer than that the judgment fully recognized the independence and exclusive jurisdiction of the Church in every genuine exercise of Church discipline. In moving the final judgment, the Court laid it down expressly that "the "Church Courts have an exclusive jurisdiction in inflicting "Church censures. The keys, by the Confession of Faith, "are committed to them alone, and the Court of Session "has no jurisdiction whatever in such matters. But a "Court possessing an exclusive jurisdiction is not entitled "to commit the great wrong of perverting and distorting "that jurisdiction in order to set aside rights which the "Civil Court is bound to protect."* In fact, the judges in

* Cruickshank *v.* Gordon, 10th March, 1843. 5 D, 923.

giving redress against a tyrannical abuse of ecclesiastical powers, went expressly on the principle stated by Knox, in his *Appellation to the Nobility and Estates of Scotland:* "It is lawful to God's prophets and to preachers of Christ "Jesus to appeal from the sentence and judgment of the "visible Church to the knowledge of the temporal magis- "trate, who, by God's law, is bound to hear their causes, *and* "*to defend them from tyranny.*" *

Another instance adduced in the Claim of Right in support of the same charge, is what is called the second Auchterarder case; and here all that we have is the startling statement that it was a case where the members of an inferior Church Court were held liable in damages "for refusing to break their ordination vows and oaths" by disobeying the orders of a superior Church Court in a spiritual matter. As to what the case was about, or in what circumstances the decision of the Court was given, not a word. Nothing but the bare assertion that the Court of Session found a Presbytery liable in damages, because they refused to break their ordination oaths and vows. A grave charge truly. Let us see what the facts were.

It was the sequel of the first Auchterarder case, already noticed, in which the power of the General Assembly to pass the Veto Act was tried, and in which it was decided, first in the Court of Session and then in the House of Lords, that the refusal to take a presentee on trial in respect of that Act was illegal. After this decision had been pronounced, the presentee came to the Presbytery and asked them to act upon it, by taking him on trial. But the Presbytery, in defiance of the judgment, refused to do so, and therefore the presentee resorted to the only alternative available to him. He could not force the Presbytery to take him on trial, and he therefore asked that

* See Lord Medwyn's opinion.

the Court should find them liable in compensation for the civil loss to which their illegal refusal had subjected him. And the Court found that he was entitled to damages. How could they do otherwise? If the refusal to take the presentee on trial had been decided to be illegal—if the obligation to take him on trial was a civil obligation, and if the loss to the presentee was a civil loss, on what principle could the Presbytery ask exemption from liability to the presentee in damages, if they persisted in their illegal refusal? More than this, the Presbytery was liable to make reparation for the civil wrong on the showing of the Claim of Right itself. That document, whatever it says as to the other cases, does not question that the decision in the first Auchterarder case fell within the legitimate jurisdiction of the Courts of Law, and it expressly states that the Church "implicitly bowed to the decision, so far as disposing of civil interests." But here was a civil interest involved in the refusal of the Church to obey the decision; and if that civil interest was sacrificed by the refusal, on what principle—if they bowed to the decision as regards its civil consequences—could they refuse to make civil reparation, which was all that they were asked to do?

Yet, without one word of explanation, the decision of the Court finding damages due, if the Presbytery, in defiance of the decision of the House of Lords, persisted in their refusal, is in the Claim of Right characterized as one by which the Court of Session "held the members of an "inferior Court judicatory *liable in damages for refusing to "break their ordination vows and oaths"!* More than this: the Claim of Right asserts that the Presbytery was in this case found liable in damages because they refused to break their ordination oaths and vows "by setting at defiance the "sentences in matters spiritual and ecclesiastical of their "superior Church judicatories, to which, *by the constitution of*

"*the Church and country*, they are in such matters sub-"ordinate and subject, and which by their said vows and "oaths they stand pledged to obey." In the absence of all explanation the only inference from this would be that the Court of Session had required the Presbytery of Auchterarder to set at defiance the *lawful* sentence of a superior Church Court—an inference which would be absolutely false. The only orders of a superior Court which a Presbytery is bound to obey are those which are lawful and *intra vires* of the Court which issues them. There is not a word in the Claim of Right explaining—what is the fact—that the order issued in this case by the General Assembly was one which by a judgment of the House of Lords had been declared illegal, and that it was one therefore which by "the constitution of the Church and country" the members of Presbytery were bound to disregard. The duty required of them—that, namely, of entering on the procedure necessary to supply a vacant parish—was a civil duty; and therefore the members of Presbytery would have been guilty of a direct breach of "the vows and oaths" which they made at their ordination, had they refused to fulfil this important part of their ministerial functions. If they had entered on the discharge of these functions, the Civil Courts, it was admitted, could not have reviewed their proceedings, or inquired into any alleged error. But what was decided—and affirmed in the House of Lords—was that "Courts or "public officers, having a ministerial duty to perform, "are liable to action for refusal to enter upon the "performance."* Yet all this is kept back in the Claim of Right. The reader is not even told what the case was about, or for what reason the Presbytery was sought to be subjected in damages. All that is put forth is the bare unqualified, unexplained assertion that the

* 1 Bell's App., p. 662.

Court of Session had, in a purely spiritual matter involving no civil interest, found a Presbytery liable in damages because they "refused to break their ordination vows and oaths" by disobeying the orders of their ecclesiastical superiors—all information as to what these orders were being withheld.

In noticing these cases it does not in any way fall within the scope of my purpose to discuss the questions of law involved in them. Although it could be shown that in every one of them the Court of Session had committed an error of judgment it would not affect the question; for—apart from the fact that the Court of Session was charged with doing what it did not do at all—the accusation against the Court was, not that they had erred in interpreting the law, but that in defiance of law and statute they had judged in the cases at all. But it is impossible, in passing, to avoid noticing how much the unjust and foolish charge against the Supreme Court of setting the law at defiance is applicable to the Non-intrusion party themselves. In this second case of Auchterarder, and in a long catalogue of cases which followed, the whole difficulty arose from the dominant party in the Church insisting on maintaining the Veto Act after it had been declared to be *ultra vires* and illegal. Some of the best men among themselves were of opinion that they should have at once conformed to the decision of the House of Lords by repealing it. Dr. Chalmers published a pamphlet* in which he urged them to rescind it; and their own friend, Lord Cockburn, writing in 1842, says, "They are "suffering severely and justly for the folly of adhering to "the Veto Act after the House of Lords declared it to be "illegal."† And Lord Cockburn adds, what is most true,

* What ought the Church and people of Scotland to do now?

† Life, Vol. I, p. 331.

that "giving it up would not have been inconsistent with "any of their constitutional principles, however incon- "venient it might have been to their policy, or however "galling to their pride. Their not doing so is the source "of most of their troubles."

Before leaving this Auchterarder case, there is one point in connection with it to which I would ask attention, as showing not only how much the Veto Act was opposed to the old and settled law of the Church, but how illogical and inconsistent the Claim of Right is. In a paragraph preceding that which professes to state what the Court of Session did in the Auchterarder case, the Claim of Right says that, by the Act 1690, c. 73, entitled "Act concerning Patronages," the whole matter of the rights of the people was "definitely settled"; and the Claim of Right complains that what the Court of Session did was to unsettle what had thus been definitely settled—to upset, in short, a condition of things with which the Church was contented, and in which she sought to be protected. Now, observe *what* it was that was settled and fixed by this important Act. By it—I quote the words of the Claim of Right itself—"a right was vested in the heritors and elders of the "respective parishes to name and propose the person to the "whole congregation to be approved or disapproved by "them—*the disapprovers giving in their reasons* to the effect "the affair *may be cognosced by the Presbytery of the* "*bounds*."

But the Veto Act *unsettled* all that was thus "definitely settled." Not only in disregard of the later Act of Queen Anne, but in direct violation of this old statute of 1690, the Veto Act dispensed with the disapprovers giving in reasons. It vested in them—an irresponsible body—the absolute and final power of rejecting a presentee without assigning any reason whatever, and it took entirely out of the hands of

the Presbytery the power and the duty of "cognoscing" upon the matter, which the Act of 1690 conferred upon them, and which it required them to exercise as a statutory duty. It does not concern me to discuss in what respect matters were altered by legislation subsequent to 1690. All that I desire to point out is that while the Claim of Right is careful to point out that an Act which is described as having "definitely settled" everything, and which is referred to as one which met the views of the Church, required the people, if they objected to a presentee, to state their reasons, and vested in the Presbytery the power and the duty of judging of these reasons, the Veto Act reversed all that, giving to the people an absolute and unreasoning veto, and depriving the Presbytery of all power of cognition. Yet the Non-intrusionists clung to the Veto Act; and their refusal to repeal it after it had been declared illegal was the chief cause of all the trouble that overtook them and the Church.

To pass to another instance—one of the very worst in this extraordinary document. The Claim of Right asserts that the Court of Session carried their illegal encroachments on the spiritual privileges and jurisdiction of the Church so far as to "*interdict the General Assembly and* "*inferior Church judicatories from inflicting Church cen-*"*sures*, as in one case where interdict was granted against "the pronouncing of sentence of deposition upon a minister "found guilty of theft by a judgment acquiesced in by him-"self;* in another, where a Presbytery was interdicted from "proceeding in the trial of a minister accused of fraud and "swindling;† and in a third where a Presbytery was inter-"dicted from proceeding with a libel against a licentiate for "drunkenness, obscenity, and profane swearing."‡ Here,

* Cambusnethan case. † Stranraer case.
‡ 4th Lethendy case.

again, not a word of explanation is given, and the only inference to be drawn from the statement is that, in matters of legitimate discipline, which from the beginning of the Church's history have been uniformly recognized as falling within the Church's jurisdiction, and which in the cases instanced were depending before Courts of the Church duly constituted, the Court of Session had wantonly and tyrannically stepped in to shield from the Church's discipline a thief, a swindler, and a drunkard.

The serious charge thus left to be inferred against the Supreme Court is, like the others adduced already, without a shadow of foundation. In the cases cited, there was no question raised before the Court of Session as to the guilt or innocence of the parties accused. No question was raised there as to the right and the duty of the Church Courts to deal with such questions, for that was admitted without qualification. Neither was it sought in any of the cases cited to protect the wrongdoers from the punishment justly due to the crimes of which they stood accused. None of these questions was before the Court, and into none of them did the Court inquire. In not one of them was it proposed to supersede the jurisdiction of the Church Courts. In all of them, the only question raised was an important question of law *affecting the constitution of the Church Courts* which had dealt, or were dealing with these cases. The averment of the complainers was that, by the introduction into Presbyteries of parties who were not entitled to sit there as judges, the constitution of the Courts had been vitiated. We admit, the complainers said, that the errors of which we are accused, fall properly within the jurisdiction and discipline of the Courts of the Church; but we claim to be tried by those alone who, by the settled constitution of the Church, are entitled to sit as judges in the Presbytery. And all that the Court

of Session was asked to do was, not to shield the parties accused from the discipline of the Church, but simply to stay proceedings until the legal question of the constitution of the Court, before whom they had been cited, should be settled. It was in regard to this question alone—a pure question of law, involving civil interest —that the Court exercised jurisdiction. The Lord President, in one of the cases, emphatically declared: "*No "one must suppose that it is our wish to interfere with "the ecclesiastical functions of the Presbytery;* but we have "the assertion made, and there is no doubt of it, that an "individual sits as a member of the Presbytery, who is not "entitled to enter the door, and that, therefore, any "sentence pronounced by the Presbytery must be null and "void *quoad* its execution." The accused party might be all that was bad; but he was entitled to be tried by the judges competent to try him according to the law of the Church, and the law of the land. And in each case, the most important civil and patrimonial rights were at stake. It was only for protection against any thing being done contrary to law which would affect these civil rights that the Court of Session was appealed to; and because of these civil rights alone did the Court exercise its jurisdiction. How entirely does this simple explanation dispose of the gross imputation made against the Court, that they interposed without reason to shield from discipline drunkards, thieves, and swindlers. Yet not one word is stated in the Claim of Right explanatory of the circumstances in which the jurisdiction of the Court was so justly and legitimately exercised.

Two other decisions are cited—both arising out of the Strathbogie case—in each of which the Court of Session is accused of having invaded the jurisdiction and encroached on the purely spiritual privileges of the Church. In one

of these* the Court is charged with having granted an interdict against the execution of a sentence of deposition, and with supporting the deposed ministers in the exercise of ministerial functions; and in the other† the Court is accused of interfering as to the right of members to take their seats in the General Assembly—"thus violating "the freedom of the Church, and violating her freedom in "the holding of General Assemblies, secured to her by "statute." Again, no explanation is given, and again, as in the other cases, it is left to be inferred that the Court had interfered, arbitrarily and tyrannically, with the acknowledged rights and privileges of the Church, and with the rights of members legally elected to take their places in the General Assembly. Yet the explanation is as easy as it is satisfactory. In the one case the Court was merely following out its previous judgment by protecting parties who had applied to it whose civil rights were threatened to be interfered with by an illegal and unconstitutional Act of the General Assembly; and in the other, all that the Court, on being appealed to, did, was to interdict from acting as members of Assembly ministers who had been elected by a minority only of their Presbytery, and who were therefore illegally elected—the Court in this, as in the other cases just noticed, only judging on a legal question regarding the proper constitution of a Court whose function it was to deal with civil rights as well as with spiritual matters.

I shall notice only one other case, that of Culsalmond.‡ It is adduced in the Claim of Right as another instance of the Court of Session stepping beyond its province, and encroaching on the spiritual privileges of the Church Courts in defiance of statute law. The assertion in the Claim is

* Third Strathbogie Case. † Fifth Strathbogie Case.

‡ Middleton *v.* Anderson, 10th March, 1842.

that the Court in this case "interdicted the execution "of the sentence of a Church judicatory, prohibiting a "minister from officiating or administering ordinances "within a particular parish, pending the discussion of a "cause in the Church Courts as to the validity of his "settlement therein." Here, again, no explanation is given, and it is left to be inferred that the Court had arbitrarily interfered in a purely spiritual matter, in which the Church Courts were acting in a legal and constitutional manner. The fact is withheld that the act complained of was the extraordinary and unprecedented attempt of the Commission of Assembly to suspend an ordained minister actually settled, and to prohibit the administration of ordinances in a parish, on the mere allegation of certain individuals, that his settlement had been irregular, and that the commission had done this, not only without hearing the parties, but before they had even been cited. The whole matter arose out of the continued determination of the Non-intrusion party to enforce the Veto Act after it had been declared illegal. The facts were these. An ordained minister had received a presentation to a parish, and the Presbytery, in fulfilment of their ministerial duty, and acting on their own unbiassed judgment, sustained the call, and admitted him. A minority of the Presbytery, however, and certain of the parishioners presented a petition to the Commission of the Assembly—whose power to entertain the matter at all, by the way, was more than questionable —complaining of the settlement on the ground, *inter alia*, and "more especially" that, in their proceedings in the settlement, the Presbytery had disregarded the Veto Act. The Presbytery had certainly disregarded that Act, and for the very good reason that it had been declared *ultra vires* and illegal by the judgment of the House of Lords. The Commission, however, ordered the parties to be cited before

them, and in the meantime took, as I have said, the extraordinary and unwarrantable step of prohibiting the minister from officiating or administering ordinances until the case should be heard. It was in these circumstances that the minister applied to the Court for protection, and got it. The Lord President said: "The attempt to arrest the "settlement being founded principally, if not solely, on the "application of the Veto law, and that law as a legislative "Act of the Church having been declared wholly abortive, "the right of those aggrieved by the extraordinary and "unprecedented interference of the Commission of the "General Assembly to apply for protection flows directly "from the solemn determination of the law promulgated "by the judgment of the House of Lords in the case of "Auchterarder." As I have already said, the Claim of Right avers that "the Church" had bowed to that decision as regarded civil rights, but here the action of the Commission was a direct invasion of civil rights. This the Lord President noticed. "Any attempt," his lordship said, "to use the Veto law as a bar to the taking on trials and "admission of a presentee *is a direct invasion of civil right.* "The Church is utterly powerless in attempting to subvert "by its own authority the law of Patronage, which is a mat-"ter regulated by the statutory law of the land, and to which, "until altered by the legislature, implicit obedience must "be given." In such circumstances, it was obviously the function, as it was the duty, of the Court to uphold the statute law, and to give effect to the decision of the House of Lords. It had no alternative. Yet all this is kept back, and without a word of explanation the case is represented as one in which the Court of Session had tyrannically interfered to subvert the government of the Church and to violate statute law!

Such are the principal cases dealt with in the Claim

of Right. In not one of them did the Court of Session do what it accuses them of doing. In not one of them did that Court do anything but exercise the judicial function, imposed upon it by the laws of the country, of judging when required in cases where civil interests were concerned; and in every one of them the decision proceeded on the ground that the constitution of the Church itself was being sought to be violated, and that the interposition of the Court was necessary to protect it from violation.

Had the Court erred in judgment in any of the cases, it would not have been surprising. If in point of fact they did err, it would not in any way affect my argument, for in every case the Court admitted the independence of the Church Courts acting within their own province, and proceeded on the ground of some excess of power, resulting in a violation or denial of civil rights. All courts occasionally err; but no one would dream of accusing them of acting "in defiance of statutes, and in contempt of law," because they erred in the application of the law. I believe it to be now the opinion of the soundest lawyers that in all the predisruption cases—with one unimportant exception—the decisions of the Court of Session were the result of a true interpretation of the law, and that the cases fell legitimately within its proper jurisdiction as the only tribunal competent to decide disputed points involving civil interests. The exception to which I have referred, was one where I think the Court was wrong; but that case has been made use of to an extent altogether beyond its importance. It was an interdict granted in absence. The parties complained of made no appearance; and in such cases interdicts are apt to be granted without that consideration which the matter would receive were appearance made, and the question argued. As it was, it was a very harmless

proceeding. The party who applied for the interdict never sought to enforce it. The party against whom it was directed paid no attention to it, and certainly the Church was not in that instance "coerced," or the freedom of her action arrested by anything the Court did. Had the case proceeded, there can be no doubt that the interdict would have been recalled—and that for the simple reason that, however unwarrantable and provoking the conduct of the party complained of was, no civil interest was involved. I may add that, as a rule, all the interdicts were set at defiance by the Non-intrusion party, which openly sought "to show its contempt of the Civil Court." * The members, illegally elected by the minority of the Strathbogie Presbytery, took their places in the General Assembly in avowed defiance of the judgment of the Court of Session—announcing as they did so that they had come there to break the interdict. In the same spirit, while the Stewarton case was in dependence, a case which involved the most important civil interests, and which on the admission of the Non-intrusionists themselves, fell to be determined on the interpretation of statutes—the General Assembly declared its resolution to maintain the *quoad sacra* ministers, whatever the determination of the Court might be. †

In every one of the other cases the Court of Session did no more than exercise its legitimate function of judging on matters of civil interest. It exercised no "coercion" in the settlement of ministers—it never sought to compel the Church Courts to break oaths and vows, or do anything else which their conscience disapproved. It only, when called upon, decided what the law was; and when the dominant party refused, in matters affecting civil interest, to obey the law, the Court had no

* Life of Lord Cockburn, vol. I, p. 235. † Ibid, p. 235.

alternative but to ordain them to make compensation to the parties whose civil rights were compromised by the refusal. The majority in the Assembly professed to yield implicit obedience to the sentences of the Courts of Law in those civil matters which concerned themselves, but refused to obey them where the rights of others were concerned. In these cases they sought to shelter themselves under the plea that the act declared illegal was a spiritual act, and that the Court of Session had no jurisdiction, even though in carrying out the spiritual sentence civil rights were sacrificed. What we have done, they said, is a spiritual act; if it injuriously affects the civil rights of other parties, so much the worse for these parties; that is *jus tertii* to us, and you the Court of Session cannot inquire into it or give relief, however illegal you may consider our proceedings to be. The answer of the Court—as it must be the answer of every jurist—was: The question of our jurisdiction depends upon the other question, whether, by the laws under which alone the Church has a corporate existence, you have power to do the acts complained of—and of that question we are, by the laws and constitution of the kingdom, the only judges. If we find you *have* the power, we cannot entertain the complaint, whether we approve of your acts or disapprove of them. But, if the party complaining avers, and succeeds in satisfying us, that you have exceeded your power, then it will be our duty to declare your sentence null. With its purely spiritual consequences we have nothing to do; but we shall declare it null, and set it aside, in so far as it interposes as a bar to that relief to which every subject is entitled, where his civil rights are affected by an illegal act. On that principle, and on that only, did the Court act in all the predisruption cases, and it was on precisely the same principle that it dealt with the Free Church in the Cardross case.

But it was not on that principle, nor on any principle, that the Court did, or, rather, could possibly have done, what is alleged against them in the Claim of Right. The statement that they did what is there alleged is simply baseless. And I may add that the cases which have occurred since 1843 abundantly prove that none of the decisions referred to justify the allegation that the Civil Court, in pronouncing them, asserted a right to interfere with "the peculiar functions and exclusive jurisdiction" of the Courts of the Church.*

I may add that it has become a stereotyped boast of the party in the Free Church, now represented by Dr. Rainy, that the Claim of Right has never been answered. Nothing could be further from the truth. Putting aside the answers which have been made to it over and over again in various publications since 1843, it is enough to say — paradoxical though it may seem — that it was answered before it was written. The Claim of Right is truly nothing more than a *rechauffé* of what the party had brought forward in the cases decided before its date. All the statutes, all the decisions, all the averments in it, are the same statutes and decisions and averments on which they founded in these cases—only the Free Church party, when they were at the bar, did not venture to present to the Court such a misleading account of the cases as the Claim of Right does. They argued that, according to their construction of the statutes and decisions, all that they had done was legal, and that the parties complaining were not entitled to redress. The answer to all this is to be found in the statements of the parties on the opposite side—and

* See Sturrock *v.* Greig, 3rd July, 1849, 11 D, 1220; Lockhart *v.* Presbytery of Deer, 5th July, 1851, 13 D, 1296; Paterson *v.* Presbytery of Dunbar, 9th March, 1861, 23 D, 720; Wight *v.* Presbytery of Dunkeld, 29th June, 1870, 8 MacP., 921.

these were full and exhaustive. The report of the pleadings, and of the speeches of the judges in the Auchterarder case alone, occupies two bulky octavo volumes of the Law Reports. And the answers prevailed. The Courts of Law, sitting in judgment as impartial tribunals, were satisfied that the Free Church party was in the wrong, and they decided accordingly, giving that redress in regard to the civil rights and interests involved, which the circumstances of each case called for. The Claim of Right, therefore, is—except in one important particular—nothing more than a repetition of the case of a disappointed litigant—worthless for every practical purpose after the case had been decided, and his pleas repelled as untenable.

But in one particular the Claim of Right is not a repetition of the case which the Free Church party submitted to the Court. With intelligent judges on the bench, and acute counsel on the other side of the bar, and with the authorized reports of the decisions open before them, the Non-intrusionists could not venture to state matters as other than they were. They were free to use such argument as they thought proper, but with facts they did not dare to tamper. Had the same course been followed in the Claim of Right—had the facts been stated in each case fairly and impartially, as they came out before the Court—the Claim of Right would have proved a very harmless, and, for the purpose intended, a very useless document. But in the Claim of Right that course was not taken; and when, in the form in which it has been presented, an answer to it is challenged, the answer is a short one—it is not true. The premises being false, the conclusion falls to the ground. Had the premises been true—had the Court of Session done what the Claim alleges, there might be some room for argument. But, if the accusation against the Court of Session is untrue — if any

man of ordinary intelligence can, by turning up the law reports, see for himself, as he will see, that the Court did *not* do what it is accused of doing, there is no case to argue about. When the Claim of Right, for example, makes the wild assertion that the erection of parishes by the Church on its own authority, and the assigning to the members and elders of such parishes seats in the Church Courts had been "uninterruptedly practised from the Reformation to this day," what are we to think of the party which makes it matter of boast that that assertion has never been answered?

And so with the other assertions in the Claim of Right. So with the assertion—in which it is all summed up—that in all the decisions quoted, the Court of Session had "invaded the jurisdiction of the Church, had usurped the "power of the keys, had illegally attempted to coerce the "Church Courts, and had acted in opposition to the "doctrine of God's Word, in violation of the constitution "of the country, in defiance of the statutes, in breach "of the Treaty of Union, and in contempt of the laws "of the kingdom." That is what the Claim of Right asserts —what Dr. Rainy and his party continue to assert. I think the friends of truth have erred in contenting themselves with a simple denial of it, and challenging the party which makes the assertion to prove it. But as that party have never responded to this challenge, and yet continue to repeat the assertion, I think it is proper to assume the *onus* of proving the negative. This I have attempted to do. I have at least said enough to make it the duty of every candid Free Churchman to examine into the facts and judge for himself.

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